

NO. 76-5344

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

UNITED STATES ex rel.
JAMES R. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

OPPOSITION TO
PETITION FOR ISSUANCE OF
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STATEMENT OF FACTS

Petitioner's statement of fact contains so many inaccuracies and omits so many pertinent facts that respondent is forced to submit the following more accurate and complete statement of facts.

On December 14, 1967, around 12:00 noon, Marilyn Miller was raped in her Hyde Park apartment. The day was sunny and bright (Tr. 209-210, 305). She lay down for a nap at 11:15 or 11:30 and was asleep on her bed fully clothed when she was rudely awakened by the presence of an intruder in her home (Tr. 210-211). She looked up and saw a large man whom she later described as/over 6 feet tall, very powerful, dark complected, young Negro male, over 200 pounds in weight, standing in the doorway of her bedroom (Tr. 228). Contrary to the implication of the petition, the room was illuminated by multiple light sources. Light was coming in through one

window of the bedroom, which was partially covered by a torn quilt or blanket, but not so much as to keep no light from coming in. Light was also coming in through the second bedroom window, which was covered by a translucent gauze which "wouldn't keep out any light" (Tr. 304). Light was coming in through two doorways to the bedroom from the living-dining room of the apartment which was illuminated by bright sunlight (Tr. 304-306).

Marilyn Miller was "extremely alert" (Tr. 311) when she viewed her attacker as he entered the room. She looked directly at him, observing his face and his body, his build and the way he was dressed for 10 to 15 seconds under the lighting conditions just described (Tr. 211-216). Contrary to the implications in the petition, he was not wearing a mask at this time. She never took her eyes off him during this time (Tr. 315).

lie on her stomach and partially undressed her, threatening her with a knife-like sharp object. After turning her over on her back, he forced her to submit to oral copulation and then raped her. Only after he turned her over was he wearing a mask (Tr. 214-223). Before leaving her apartment, he took a flute and a guitar belonging to her.

He left behind a plastic folder resembling a checkbook or an address book which contained a letter belonging to a former girlfriend of his, a person not shown to be in any way connected with the victim (Tr. 223-225).

Marilyn Miller then called the police, who took her to Billings Hospital, where she was examined. A vaginal smear taken at that time and her underpants both carried traces of human spermatozoa (Tr. 224-229, 373, 375).

After her examination at the hospital, on the same day as the rape, she told police that she was accosted in a nearby restaurant by the rapist, whom she later identified as petitioner James Raymond Moore. He took her by the hand and on the pretense of reading her palm, made some suggestive remarks

about a supposed lack in her love life and his ability to supply what she needed (Tr. 235-239). The next day he raped her.

The police showed Marilyn Miller several hundred photographs from which she selected two as possibly depicting her assailant. One was a photograph of petitioner James Raymond Moore (Tr. 230-231). She positively identified James Raymond Moore as her attacker at a preliminary hearing on December 21, 1967 (Tr. 232-235) where a summary of the evidence then in the hands of the police was also presented to the judge in order to aid him in setting bond. The hearing was continued, probable cause was later found, and the case was bound over to the grand jury which indicted Moore for rape, deviate sexual assault, burglary, and robbery.

Moore was convicted of these charges at trial and sentenced to 30 to 50 years. The transcript of his trial is attached to the respondent's motion for summary judgment in the District Court as Exhibit B, and is in the record on appeal before the Court of Appeals. Moore's conviction was affirmed by the Illinois Supreme Court, People v. Moore, 51 Ill. 2d 79 (1972). He then filed the present habeas corpus petition (No. 73 C 2222 in the United States District Court for the Northern District of Illinois) and was eventually denied relief by Judge Lynch in his order of June 5, 1975. The Seventh Circuit Court of Appeals affirmed that decision in an unpublished order attached to the petition.

Petitioner now presents two claims to this court. First, he claims he was subjected to a showup in violation of United States v. Wade, 388 U.S. 218 (1967), and Stovall v. Denno, 388 U.S. 293 (1967), at the preliminary hearing of December 21, 1967. Second, he claims he was denied effective assistance of counsel and hence due process because he was not supplied with a free transcript of that hearing.

THERE WAS AN ORIGIN FOR MARILYN MILLER'S IN-COURT IDENTIFICATION OF JAMES RAYMOND MOORE, INDEPENDENT OF ANY PRETRIAL IDENTIFICATION WHICH MAY HAVE VIOLATED WADE OR STOVALL.

All of petitioner's arguments stem from one basic allegation: that Marilyn Miller's identification of James Raymond Moore at the December 21, 1967, preliminary hearing was violative of United States v. Wade, 388 U.S. 218 (1967), because counsel was not present, and Stovall v. Denno, 388 U.S. 293 (1967), because it was allegedly suggestive. It is clear that even where a violation of these cases is present, the conviction cannot be reversed if the defendant was identified at trial by the witness in question and that identification was based upon a source independent of the allegedly improper pretrial confrontation. United States v. Wade, supra; Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, supra; Simmons v. United States, 390 U.S. 377 (1967); Coleman v. Alabama, 399 U.S. 1 (1970); Neil v. Biggers, 409 U.S. 188 (1972); United States v. Pigg, 471 F.2d 843 (7th Cir. 1973); United States ex rel. Kirby v. Sturges, 510 F.2d 397 (7th Cir. 1975); United States ex rel. Pierce v. Cannon, 508 F.2d 197 (7th Cir. 1974), among many others. This is just what happened in the present case as the District Court held at page 14 of its opinion and the Court of Appeals held at page 4 of its opinion. (See Tr. 213-214 for the in-court identification.)

On December 13, 1967, the night before the crime, the victim, Marilyn Miller, was approached in a restaurant near her apartment by James Raymond Moore. Moore had several minutes of conversation with Marilyn Miller, the gist of which was that Miss Miller's love life was lacking and that he could make up for that Jack. Miss Miller was offended by this conversation and the person who initiated it, James Raymond Moore.

The next day around noon on a bright sunny day, James Raymond Moore entered Marilyn Miller's apartment and raped her. The room where the attack took place was well lighted. Light streamed in from two doors and two only partially covered windows. Miss Miller got a good look at Moore for 10 to 15 seconds as he stood in the doorway and entered the room. She never took her eyes off him during this time. She was also able to observe all of him but that part of his face between the bridge of his nose and his chin at several other times during the course of the attack.

In contrast, the court's attention is called to Coleman v. Alabama, supra where the witness caught a glimpse in the headlights of a passing car of the face of his assailant as he fled. This was held to be a sufficient independent origin. See United States ex rel. Kirby v. Sturges, supra; United States ex rel. Pierce v. Cannon, supra; United States v. Pigg, supra; United States ex rel. Harris v. Illinois, 457 F.2d 191 (7th Cir. 1972), cert. denied, 409 U.S. 860 (1972); United States v. Ganter, 436 F.2d 364 (7th Cir. 1970); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969), cert. denied, 369 U.S. 1017; United States v. Cox, 428 F.2d 683 (7th Cir. 1970), cert. denied, 400 U.S. 481; United States ex rel. Frazier v. Henderson, 464 F.2d 260 (2d Cir. 1972); United States ex rel. Phipps v. Follette, 428 F.2d 912 (2d Cir. 1970), cert. denied, 400 U.S. 908.

Petitioner emphasizes the question of suggestiveness but fails to deal adequately with the question of independent origin. No matter how suggestive the December 21, 1967, identification procedure may have been, it was still reliable because there was an origin for the identification independent of any suggestiveness in the identification procedure itself.

United States v. Wade, supra; Gilbert v. California, supra; Stovall v. Denno, supra.

For instance, if Miss Miller's boyfriend had committed some crime against her and she observed him under circumstances

similar to those under which she observed Moore and subsequently was asked to identify him under the most suggestive conditions conceivable, there could be no question that notwithstanding the suggestiveness of the identification procedure, her identification would be a valid one, perfectly admissible under all the cases previously cited. Why? Because she had his features firmly fixed in her mind before the identification ever took place. Although less obvious, exactly the same thing actually occurred in this case.

Although Miss Miller did not know Moore's name, she knew before he ever entered the courtroom on December 21, 1967, who it was that raped her, and when he appeared she recognized James Raymond Moore as that man. The court is referred to Miss Miller's testimony found in the transcript at pages 92 ff. and 207 ff. The testimony read as a whole makes clear that she was positive of her identification.

In the end, petitioner's authorities about mistaken identification to the contrary notwithstanding, the testimony of the witness him- or herself is the most important factor, particularly under the present circumstances. Miss Miller had no reason to lie and fully realized that the more certain her testimony was, the more certain it would be that James Moore would go to jail for a long time. Moore's wife pleaded with her to be sure that she had the right man (Tr. 85).

Furthermore, if counsel's affidavit in the District Court is to be believed, Miss Miller was made fully aware of the fact that the flute and guitar supposedly were not hers. She is supposed to have told Mr. Walsh so after examining them in his office. This itself vitiates the alleged suggestiveness of Walsh's statement on December 21, 1967. Not only that, but in the face of this knowledge, her certainty was not for one moment shaken. On the other hand, Moore had every reason to lie and still does. As the District Court held (Opinion at pages 11-13), all of the indicia of reliability set forth in Biggers and Kirby are present in this case.

On this score, it must also be stated that the fact that Miss Miller did not immediately tell police that her assailant was the man she met in the restaurant the night before is not significant. She was upset as a result of the crime and could not necessarily be expected to make the connection immediately. The fact that it took a short time for her to sort out her thoughts does not cast doubt upon her identification of Moore. She told police about the incident the night before and indicated to them that the man in the restaurant was the rapist on the very day of the rape after she returned home from the hospital (Tr. 307). Furthermore, Moore conceded that he had been in the restaurant that night (Tr. 513-51). When this is added to the fact that Moore left the folder containing a letter belonging to his girlfriend at the scene of the crime, something only he could have left there, Miss Miller's accurate description of him, and her certainty that he was the man, her identification of him cannot be doubted.

It must also be noted that the courts below found independent origin as did the Illinois Supreme Court, People v. Moore, 281 N.E. 2d at 298. Such a finding is presumed correct and cannot be upset by a federal court in a habeas corpus proceeding unless not supported by the evidence, 28 U.S.C. 2254(d); LaVallee v. Delle Rose, 410 U.S. 690 (1973); United States ex rel. Harris v. Illinois, 457 F.2d 191 (7th Cir. 1972), cert. denied, 409 U.S. 860 (1972).

Finally, it must be noted that we are not dealing with an impersonal crime such as burglary. We are dealing with rape, the most personally humiliating of all crimes. Not only that, but James Raymond Moore was so bold as to invade his victim's own home. The features of a man who would do such a terrible thing were indelibly etched upon the memory of Marilyn Miller and no suggestiveness of any degree could lead her into making a mistake.

Her testimony is clear. During examination of her by defense counsel at defendant's motion to suppress, the following colloquy about the December 21, 1967, proceeding took place:

Q. So it's when you came up and your name was called, did you realize that the person James Moore being brought out was the suspect you were supposed to identify?

A. I knew it was the man. I recognized him.

and again on direct examination at trial:

Q. Did you know at the time, Marilyn, that he stepped out of that door, that he was James Moore?

A. I knew he was the man who raped me.
(Tr. 234)

and again on cross-examination at trial:

Q. So when Mr. Moore was brought out here, you knew he was the man who they wanted you to look at, is that correct?

MR. TULLY: Objection.

THE COURT: Sustained.

MR. COHN: Did you think he was a stranger to the proceedings?

A. I knew who he was.

* * *

Q. Did you believe he was a defendant?

A. I knew he was the man who raped me.
(Tr. 284-285)

and again on redirect examination at trial:

Q. When you saw James Moore come out of that side door in Judge Ryan's chambers (sic, courtroom), did you recognize him at that time?

A. Yes.

Q. Did you recognize him at that time as the man who raped you on the 14th of December, 1967?

A. Yes. I'd never forget his face.

Q. Are you sure that's the man?

A. I'm positive. (Tr. 308)

Clearly, Marilyn Miller identified Moore as the rapist because she remembered him, not because of any suggestiveness in the identification proceedings.

Petitioner attempts to mislead the court on several points relative to this argument. At page 6 of the petition, petitioner states that the victim testified that when she observed the rapist he was masked. This is false. She clearly testified that he did not put the mask on until after he had attacked her and the 10 to 15 second period before the attack of observation occurred/as he stood in the doorway of her bedroom.

On the same page, petitioner falsely states that the victim did not inform police she had seen the rapist the night before until several days after / The record shows that she informed the police the same day. On page 7, petitioner makes the argument not made in any of the courts below that the victim was not positive of her identification. The most salient feature of the present case and the reason that a jury and three courts have thus far allowed petitioner's conviction to stand is the certainty of Miss Miller's identification of Petitioner Moore. The record discloses this certainty with the utmost clarity, particularly in the testimony cited above. Petitioner tries to extract uncertainty from the record where it simply does not exist.

At page 8 of the petition, petitioner makes the bare allegation that the photographic array from which the victim picked Moore's picture was suggestive. Not one shred of evidence is cited to support this conclusion. The courts below found that the photographic identification was proper and constituted an independent and untainted identification of petitioner.

On page 8 petitioner again repeats the falsehood that the victim saw Moore's masked face for 15 seconds. He also repeatedly asserts the falsehood that Miss Miller was uncertain in her identification of petitioner and adds the words "admittedly" and "undisputed" to these false assertions. It was vigorously argued in both courts below that Miss Miller was certain of her identification and both courts

so found. In light of this fact, the words "admittedly" and "undisputed" are completely inappropriate.

At the bottom of page 8, Miss Miller's testimony is falsely characterized by petitioner. She did not testify that she identified Moore because she heard his name called. On the contrary, she testified that she identified him because she recognized him as the rapist. This is clearly reflected in the record as a whole and the quotations from Miss Miller's testimony cited above.

It is also clear from Kirby v. Illinois, 406 U.S. 682 (1972), as the Court of Appeals implied in its opinion, that since petitioner had not been indicted, the right to counsel under Wade did not extend to the December 21, 1967, procedure.

II

THE FAILURE OF DEFENSE COUNSEL TO RECEIVE A COPY OF THE TRANSCRIPT OF THE DECEMBER 21, 1967 PRELIMINARY HEARING DID NOT AMOUNT TO A DENIAL OF DUE PROCESS.

his lawyer could have more effectively cross-examined Marilyn Miller at trial had he had the transcript of the December 21, 1967, Preliminary Hearing (attached to the petition as Appendix B). This claim is effectively refuted by reading the trial transcript. It simply would not have been that useful. As the District Court (Opinion at page 7) and the Court of Appeals (Opinion at pages 6-8) found, the circumstances of this proceeding were adequately developed at the hearing on the motion to suppress before the Cook County Circuit Court (Tr. 79-130) with the possible exception of the remark of the Assistant State's Attorney about the evidence recovered from petitioner's apartment. Petitioner fails to acknowledge these findings or refute them in his argument on this point. There was testimony from Moore's wife and Marilyn Miller which described in detail everything that went on at the December 21, 1967, proceeding. As both courts below also found, the transcript

with or without the remark would have made no difference and if it was error for the state court to deny petitioner the transcript it was harmless beyond a reasonable doubt, Chapman v. California, 368 U.S. 18 (1967); Schneble v. Florida, 405 U.S. 427 (1972). See the opinion of the District Court at page 7 and the opinion of the Court of Appeals at pages 7-8.

It is clear that trial counsel put Miss Miller through the wringer on cross-examination and failed to shake her testimony (Tr. 241-303, 308-312). He had available to him every detail but one of the December 21, 1967, hearing and used them extensively. Only one more small factor, the remark of the Assistant State's Attorney, was missing and this would have made no difference in view of the certainty of her identification, in view of the corroborative evidence, in view of the independent origin of her in-court identification (see Section I of this memorandum) and in view of the fact that the prosecution could have shown that the Assistant State's Attorney's statement was not intentionally false and that it was not made to suggest that Moore was the criminal but merely for bond purposes. See the affidavit of Matthew Walsh in the record on appeal before the Court of Appeals.

Not a single case cited by petitioner holds that denial by the trial court of a free copy of a preliminary hearing transcript violates due process by limiting cross-examination. It is also clear that no significant limitation occurred here since, as shown above, with one small exception, the circumstances of the hearing were well known to counsel and he cross-examined on them extensively. The one additional point was merely cumulative.

III.

CONCLUSION

For these reasons, the rulings of the District Court and the Court of Appeals were correct and the petition for certiorari should be denied.

Respectfully submitted,

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